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IN THE

Supreme Court of the United States

MICHAEL A. WATSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that "use" of a firearm under § 924(c) means "active employment." *Id.* at 144. The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on various issues in this Court and other courts and has filed *amicus curiae* briefs in previous suits related to 18 U.S.C. § 924. See *Bousely* v. *United States*, 523 U.S. 614 (1998); *Bryan* v. *United States*, 524 U.S. 184 (1998); *Muscarello* v. *United States*, 524 U.S. 125 (1998).

SUMMARY OF THE ARGUMENT

In *Bailey* v. *United States*, 516 U.S. 137, 143-44 (1995), this Court recognized that a conviction under the "use" prong of 18 U.S.C. § 924(c)(1)(A) requires the government to establish that a firearm was "active[ly] employ[ed]," not "mere[ly] possess[ed]" by the defendant. This definition of "use" has remained undisturbed by subsequent congressional amendment of § 924(c)(1)(A). In addition, the common understanding of the verb *to use* is that one cannot *use* an object that one

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

does not possess or control. Thus, this Court's prior ruling in *Bailey* and the plain meaning of the word *use* establish that merely being the recipient of a firearm in exchange for drugs does not constitute "use" of a firearm "during and in relation to" a drug-trafficking offense.

Even if § 924(c)(1)(A) were not clear on its face, however, the rule of lenity dictates that any ambiguity in the term "use" must be resolved in favor of finding no criminal liability. In order to override the rule of lenity, the context and legislative history of a statute must make it unambiguously clear that the challenged conduct falls within the terms of the statute. Here, both the surrounding context of § 924(c)(1)(A) and the legislative history provide no basis for interpreting "use" to include receiving a firearm. Indeed, the statutory context and legislative history prove just the opposite. Consequently, even if the Court were to conclude that meaning of "use" in § 924(c)(1)(A) is ambiguous, this case is precisely the type of situation in which the rule of lenity was meant to apply. The Fifth Circuit's decision upholding Petitioner's conviction should be reversed.

ARGUMENT

I. THE PLAIN MEANING OF "USE" DOES NOT ENCOMPASS RECEIPT OF A FIREARM.

It is well-settled that criminal liability may be imposed under a criminal statute only for conduct that falls within the terms of the statute. See, *e.g.*, *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). In determining what conduct is sanctioned under a criminal statute, the words of the statute "must be given [their] ordinary or natural meaning." *Bailey*, 516 U.S. at 145 (internal quotation marks omitted). Because the verb *to use* does not ordinarily or naturally incorporate the concept *to receive*, § 924(c)(1)(A) on its face does not extend to cases involving a defendant's receipt of a firearm. See 18 U.S.C. § 924(c)(1)(A) (imposing liability upon "any person

who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm").

Standard English dictionaries do not support an inference that *to receive* (or, *e.g.*, *to acquire* or *to accept*) is generally incorporated into the meaning of the verb *to use*. Webster's Dictionary lists seven transitive verb definitions of *to use*, none of which convey any sense that *to use* can ordinarily refer to the act of *receiving* a commodity or good. The definitions most apt to § 924(c)(1)(A) would be the second, "to put into action or service: have recourse to or enjoyment of," or the third, "to carry out a purpose or action by means of: make instrumental to an end or process: apply to advantage: turn to account." *Webster's Third New International Dictionary* 2523-24 (1993).[2] *To use* is thus an active verb requiring possession or control of an inanimate object, unlike the passivity of *to receive*. Similarly, of the four definitions of the noun *use* in *Black's Law Dictionary*, none suggests that *use* includes the receipt of an object in trade.[3] *Black's Law Dictionary* 1540-41 (7th ed. 1999).

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[2] The definitions of *to use* closest to the concept of taking or receiving are (1) the second subpart of the second definition ("to consume or take (as liquor or drugs) regularly") and the fourth definition ("to expend or consume by putting to use."). Because receiving a firearm does not involve the ingestion or consumption of the firearm, neither definition fits the meaning that the Government is presently ascribing to the term *use*.

[3] The first definition of *use* in *Black's Law Dictionary* is "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." *Id.* at 1540. The second definition is "[a] habitual or common practice <drug use>." *Id.* at 1541. The third definition is "[a] purpose or end served <the tool had several uses>." *Id.* Finally, the fourth definition is "[a] benefit or profit; esp., the right to take profits from land owned and possessed by another; the equitable ownership of land to which another person holds the legal title <cestui que use>." *Id.* The last definition (synonymous with "benefit," as in the Statutes of Uses or *cestui que use*) is a specialized term deriving from the French *oes* or *ues* and Latin *opus*, and therefore it is etymologically unrelated to the much more com-

Moreover, judicial glosses of the verb *to use* do not support stretching the word's natural meaning to incorporate the concept of receipt. This Court has noted that "use" variously means, in the context of § 924(c)(1)(A), "[t]o convert to one's service," "to employ," "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; [or] to carry out a purpose or action by means of." *United States* v. *Smith*, 508 U.S. 223, 229 (1993) (internal quotation marks omitted) (first and second alterations in original). Indeed, for more than a century, courts have held that the verb *to use* "means to employ or to derive service from." *Id.* at 228-29 (internal quotation marks omitted) (approving a reading of § 924(c)(1) that prohibits "us[ing] or employ[ing] it as an item of barter to obtain cocaine" where the petitioner "derived service from [the firearm] because it was going to bring him the very drugs he sought" (internal quotation marks omitted)).

One cannot, however, "employ or derive service from" an object that one does not control or possess. This is particularly the case when the object is controlled by and in the possession of an opposing party in a transaction. To suggest otherwise would strain the logic of this Court's ruling in *Smith*. Although the term *use* may encompass situations in which an object is employed as a *means* to an end, here the object is the end itself. One *uses* a walking cane to do something; one does not *use* the cane to *receive* the cane.

Moreover, in analyzing the language of § 924(c)(1)(A), this Court held in *Bailey* that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." 516 U.S. at 143 (internal quotation marks omitted). "These various definitions of 'use' imply action and implementation." *Id.* at 145; see *United States* v. *Montano*, 398 F.3d 1276, 1282-84 (11th Cir. 2005) (per curiam); *United*

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mon English meaning of *use* (synonymous with employ or utilize), which derives from the French *us* and Latin *usus*. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 905 (2d ed. 1995).

States v. *Mackey*, 265 F.3d 457, 462 (6th Cir. 2001); *United States* v. *Stewart*, 246 F.3d 728, 731-33 (D.C. Cir. 2001); *United States* v. *Warwick*, 167 F.3d 965, 975-76 (6th Cir. 1999); *United States* v. *Westmoreland*, 122 F.3d 431, 435-36 (7th Cir. 1997).

Receiving or *acquiring* an object conveys something *less* than "mere possession" until the process of receipt or acquisition has ended and the receiver has taken possession of the object. Receipt or acquisition of an object also cannot suggest anything *more* than "mere possession" until the receiver does something with the object (thereby triggering a new and different verb to describe the receiver's usage). Thus, to hold that "use" incorporates the meaning of *to receive* would violate *Bailey*'s admonition that "use" refers to active employment of an object and implies a sense of control and employment greater than mere possession.

In sum, the term "use" in § 924(c)(1)(A) is unambiguous because the plain and ordinary meaning of the term does not encompass the concept of receipt. Interpreting the term "use" to mean *to receive* finds no support in common English usage, does not follow from this Court's ruling in *Smith*, and would betray this Court's holding in *Bailey*. As Chief Justice Marshall warned in *Wiltberger*:

> The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

18 U.S. (5 Wheat.) at 96. Thus, criminal liability under § 924(c)(1)(A) simply cannot be imposed on the grounds that a defendant has received a firearm in exchange for drugs.

II. EVEN IF THE TERM "USE" WERE AMBIGUOUS, THE RULE OF LENITY DICTATES THAT CRIMINAL LIABILITY NOT BE IMPOSED FOR MERELY RECEIVING A FIREARM.

The rule of lenity is "almost as old as the common law itself." Antonin Scalia, The Tanner Lectures on Human Values at Princeton University, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (Mar. 8-9, 1995).[4] Developed in the common law courts in the seventeenth and eighteenth centuries to limit the harshness of English criminal law,[5] it was adopted by this Court in 1820 in Chief Justice Marshall's oft-cited decision in *Wiltberger*. See *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (the rule of lenity reflects "the tenderness of the law for the rights of individuals"). The rule was endorsed a century later by Justice Holmes in *McBoyle* v. *United States*, 283 U.S. 25 (1931), and this Court has consistently acknowledged its validity in subsequent cases. See, *e.g.*, *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992); *Taylor* v. *United States*, 495 U.S. 575, 596 (1990); *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987), *superseded on other grounds by statute*, 18 U.S.C. § 1346, *as recognized in Cleveland* v. *United States*, 531 U.S. 12 (2000); *Dowling* v. *United States*, 473 U.S. 207, 213-14 (1985); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284-85

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[4] *See also Wiltberger*, 18 U.S. (5 Wheat.) at 95 ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

[5] *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 748-51 (1935); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 897 (2004); William Blackstone, 1 *Commentaries* *88.

(1978); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *Ladner* v. *United States*, 358 U.S. 169, 177-78 (1958); *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

A. The Rule Of Lenity Ensures That Citizens Receive Fair Warning Before Facing Penal Sanction And That The Separation Of Powers Is Preserved.

The rule of lenity is founded on "two policies that have long been part of our tradition": (i) provision of notice to the public, and (ii) separation of powers between the legislature and judiciary. *United States* v. *Bass*, 404 U.S. 336, 348 (1971). The notice requirement reflects an understanding that:

> "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Id. (quoting *McBoyle*, 283 U.S. at 27); see *Dunn* v. *United States*, 442 U.S. 100, 112 (1979) ("[The rule of lenity] reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."). While courts in some cases have accepted as a fiction the view that knowledge of criminal statutes may be imputed to the public, see, *e.g.*, *McBoyle*, 283 U.S. at 27, this Court has observed that "in the case of gun acquisition and possession it is not unreasonable to imagine a citizen attempting to steer a careful course between violation of the statute and lawful conduct." *Bass*, 404 U.S. at 348 n.15 (internal quotation marks and parentheses omitted). The need for "fair warning" is also especially acute in the context of criminal statutes like § 924(c)(1)(A) that mandate the imposition of severe penal sanctions.

Further, the rule of lenity serves as a key mechanism in preserving the separation of powers between the legislative and judicial branches. As this Court has recognized, it is the exclusive province of the legislature to proscribe conduct as criminal. Chief Justice Marshall stressed this point in *Wiltberger*, citing "the plain principle that the power of punishment is vested in the legislative, not in the judicial department" and affirming that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95. The Court again elaborated upon this principle in *Bass*:

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should."

404 U.S. at 348 (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967)). Thus, before an individual can be condemned to a multi-year prison sentence for taking a certain action in relation to a firearm, it must be clear that Congress defined that specific action as criminal.

B. The Rule Of Lenity Should Apply Because The Term "Use" In § 924(c)(1)(A) Does Not Unambiguously Include Receipt.

1. Reasonable Doubt Exists As To Whether The Statute's Plain Language Means *To Receive*.

Before a criminal defendant may be subjected to penal sanction, a court must first conclude that the statute unambiguously makes the defendant's conduct criminal. If there is a reasonable doubt as to the clarity of the statute, the rule of lenity applies. See *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) ("'When there are two rational

readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'") (alteration omitted) (quoting *McNally*, 483 U.S. at 359-60).

As this Court's decision in *Wiltberger* demonstrates, criminal liability will not be imposed for conduct that does not fall within the ordinary meaning of the statute's terms, even when other factors arguably weigh in favor of liability. In *Wiltberger*, the Court considered whether Congress's prohibition of manslaughter "on the high seas" applied to the defendant's commission of the offense on a river in China. See 18 U.S. (5 Wheat.) at 77. The Court noted that it could "conceive no reason" why the defendant's conduct should not be subject to criminal liability, and found it "extremely improbable" that Congress actually intended to exclude such conduct from punishment under the statute. *Id.* at 105. Nonetheless, the Court concluded that the ordinary meaning of the term "high seas" simply did not include foreign rivers, and that it could not "enlarge" the statute so as to encompass the defendant's actions. *Id.* Accordingly, the Court applied the rule of lenity and held that the criminal charge was not legally cognizable.

This Court has also emphasized that criminal liability should not be imposed based on even a plausible textual interpretation that reaches beyond the plain, ordinary meaning of the criminal statute. In *McBoyle*, the Court considered whether a defendant who had transported a stolen airplane could be convicted under a statute prohibiting theft of a "motor vehicle," which was defined to include any "self-propelled vehicle not designed for running on rails." 283 U.S. at 25-26. The Court found that while it was "etymologically" plausible to interpret the statutory term as including airplanes, the more ordinary reading would limit the term to land-based vehicles. *Id.* at 26-27. Thus, the Court reversed the defendant's conviction. *Id.* at 27; see *Scheidler*, 537 U.S. at 403 n.8 ("Surely if the rule of lenity . . . means anything, it means that the famil-

iar meaning of the word . . . should be preferred to the vague and obscure . . . .").

Indeed, this Court has recognized that even a limited degree of textual ambiguity will call for application of the rule of lenity. In *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22, *Ladner*, 358 U.S. at 177-78, and *McNally*, 483 U.S. at 359-60, the Court stated that the rule of lenity applies unless the statutory language at issue is "clear and definite." See *Bass*, 404 U.S. at 348-49 (lenity is appropriate unless the statute "'plainly and unmistakably'" covers the defendant's conduct) (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)). Even in *Smith*, the Court declined to apply the rule of lenity only after finding that the government's interpretation of the relevant statute was "squarely within common usage and dictionary definitions." 508 U.S. at 240.

As explained above in Part I, *supra*, § 924(c)(1)(A) unambiguously does not impose liability for receipt of a firearm because the plain, ordinary meaning of the term "use" does not encompass the concept of receipt. But even if the term "use" were ambiguous, the rule of lenity would still prohibit the imposition of criminal liability because § 924(c)(1)(A) does not make clear, plain, definite, and unmistakable that receipt of a firearm qualifies as "use."

2. The Context Of § 924(c)(1)(A) Does Not Support A Clear And Unambiguous Inference That "Use" Incorporates *To Receive*.

Not only does the plain meaning of the word *use* fail to include receipt, § 924(c)'s broader context also does not reveal any clear and unambiguous Congressional intent to incorporate *to receive* into the meaning of "use". In fact, reading the statute within its framework further demonstrates that "use" clearly does not incorporate the meaning of *to receive*. See *Smith*, 508 U.S. at 229 ("Language, of course, cannot be interpreted apart from context.").

First, construing the term "use" to include receipt of a firearm is at odds with Congress' post-*Bailey* amendment of § 924(c)(1)(A). After this Court held in *Bailey* that the term "use" in § 924(c)(1) has a narrower meaning than mere possession, Congress amended § 924(c)(1)(A) to provide that:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, *or* who, in furtherance of any such crime, possess a firearm, shall [be punished] . . . .

18 U.S.C. § 924(c)(1)(A) (emphasis added). Thus, Congress did not amend or otherwise alter the definition of the term "use," but rather created a separate possession offense, separated from the original "use" offense by the disjunctive "or." See *United States* v. *Combs*, 369 F.3d 925, 930-33 (6th Cir. 2004).

The new "possession" offense of § 924(c)(1) has two elements (*i.e.*, (1) "possess[ion]" of a firearm (2) "in furtherance of" a covered crime) that track the original "use" offense's elements (*i.e.*, (1) "use" of a firearm (2) "during and in relation to" a covered crime). The quantum of proof required to establish a "use" offense is higher than a mere possession offense. See *Bailey*, 516 U.S. at 143 (holding that "'use' must connote more than mere possession"); cf. *Muscarello*, 524 U.S. at 126-27 (holding that "carrying" requires a firearm to be on or accompanying the person); *Hilliard* v. *United States*, 157 F.3d 444, 449 (6th Cir. 1998) (holding "the proper inquiry [in determining whether a firearm is "carried"] is physical transportation").

Because it is ordinarily less difficult to establish possession than use, the "possession" offense's "in furtherance of" element requires a higher proof than the "use" offense's "during and in relation to" element. *Combs*, 369 F.3d at 932-33 (holding that "in furtherance of" element differs from "during and in relation to," "and requires the government to prove a defendant used the firearm with greater participation in the

commission of the crime"); *United States* v. *Iiland*, 254 F.3d 1264, 1274 (10th Cir. 2001) (same). See also 144 Cong. Rec. S12760, S12671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) ("I believe that the 'in furtherance' language is a slightly higher standard that encompasses 'during and in relation to' language, by requiring an indication of helping forward, promote, or advance a crime."); *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under Section 924(c) Before the Senate Comm. on the Judiciary*, 104th Cong. 24-27 (1996) (statement of Thomas G. Hungar).

Taken together, the "use" and "possession" offenses are now delicately balanced, each containing an element more difficult to prove in conjunction with one that is less demanding. But the nature of the balance reveals that Congress never intended "use" to include mere receipt of a firearm. Including bartering for the receipt of a firearm within the definition of "use" would lower the threshold for establishing "use" even below the threshold for establishing "possession," while keeping fixed the "during and relation to" element. See, *e.g.*, *Montano*, 398 F.3d at 1284 (noting that the "firearms were never in Montano's possession, either actually or constructively" where defendant was charged with "use" offense for having received firearms in narcotics-for-gun barter). There is simply no "clear and definite" indication that Congress intended to upset this careful balance, particularly when such harsh penal sanctions are at stake.

Furthermore, other provisions of § 924 demonstrate that it is not appropriate to infer that "use" includes *receiving* a firearm simply because *tendering* a firearm may constitute "use" under *Smith*. For instance, in 18 U.S.C. § 924(b) ("Whoever . . . ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce . . . ."), Congress prohibited the shipment, transportation, and receipt of fire-

arms under certain conditions.[6] The separation of the three verbs by the disjunctive "or" indicates that Congress believed that the terms "ships," "transports," and "receives" reflect three different concepts. See *Bailey*, 516 U.S. at 145 ("Judges should hesitate . . . to treat as surplusage statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.") (internal quotation marks and brackets omitted, omission in original) (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 140-41 (1994)); cf. *id.* at 146 (courts should "assume that Congress used [three] terms because it intended each term to have a particular, nonsuperfluous meaning"). Thus, just as shipping a firearm is different from receiving a firearm, so too is furnishing a firearm different from receiving a firearm.

In sum, the statutory context of § 924(c)(1)(A) provides no basis for concluding that the term "use" unambiguously includes being the recipient of a firearm. The post-*Bailey* amendments to § 924(c)(1)(A) and the presence of the term "receive" elsewhere in § 924 both suggest that it would be unreasonable to construe "use" as including receipt of a firearm, and hence the rule of lenity is particularly appropriate here.

3. Section 924(c)'s Legislative History Does Not Unambiguously Reveal Congressional Intent For "Use" To Encompass Receipt.

Resort to legislative history will ordinarily not suffice to overcome the rule of lenity. See *Crandon* v. *United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted

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[6] Similarly, Congress distinguished the verb *to acquire* from the verb *to transfer* in § 924(g), which prohibits anyone intending to commit certain offenses from traveling abroad to "acquire or transfer" a firearm "in furtherance of such purpose." 18 U.S.C. § 924(g).

by the text."). Setting aside the question of whether it is even appropriate to consider legislative history when the text of a criminal statute is ambiguous,[7] legislative history cannot override the rule of lenity unless the legislative history leaves no "reasonable doubt" regarding the statute's meaning. See *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality); *Moskal* v. *United States*, 483 U.S. 103, 108 (1990); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. . . ."); cf. *Ladner*, 358 U.S. at 177-78 (stating that legislative history must point "clearly" to a certain meaning before rule of lenity is abandoned).

Moreover, this Court has made clear that it will not construe ambiguous statutory text against a criminal defendant based on the assumption that Congress, as a matter of policy, would have meant to outlaw the defendant's conduct. See *R.L.C.*, 503 U.S. at 306 n.6 (plurality) (Congress's "'general declarations of policy'" could not support reading an ambiguous criminal statute against the defendant) (quoting *Hughey* v. *United States*, 495 U.S. 411, 422 (1990)); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.");

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[7] Although the Court has previously referred to legislative history in determining whether a statute was ambiguous enough for lenity to apply, see *United States* v. *R.L.C.*, 503 U.S. 291, 298-306 (1992) (plurality); *Moskal* v. *United States*, 498 U.S. 103, 108, 111-12 (1990), this practice has given rise to substantial disagreement. See *R.L.C.*, 503 U.S. at 307-10 (Scalia, J., concurring); *id.* at 311 (Thomas, J., concurring). Indeed, the plurality in *R.L.C.* agreed that it would be the "'rare'" occasion when legislative history could "'support a construction of a statute broader than that clearly warranted by the text.'" *Id.* at 306 n.6 (quoting *Crandon*, 494 U.S. at 160).

McBoyle, 283 U.S. at 27 (refusing to adopt an expansive reading of a statutory term "upon the speculation that, if the legislature had though of it, very likely broader words would have been used."); see also *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is a ancient one, and it must be resisted.")

Here, the legislative history of § 924(c)(1)(A) provides no basis for concluding that Congress intended to incorporate the meaning of *to receive* into the term "use." The legislative history indicates that the term "use" remains limited and only applies when a firearm is actively employed. Moreover, construing the term "use" to include receipt of a firearm has in fact undermines Congress' goal of reducing the threat posed by the combination of drugs and firearms.

First, the legislative history of the post-*Bailey* amendment of § 924(c)(1)(A) suggests that Congress intended the term "use" to remain narrowly construed. In *Bailey*, the Court held that the term "use" reflects an "active-employment understanding." *Bailey*, 516 U.S. at 148. The Court noted that the verb *to use* "takes on different meanings depending on context" but rejected the verb's "inactive function," holding that "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." *Id.* at 148-49.

The Senate and House each entertained separate bills in 1996 in response to the ruling in *Bailey*. The Senate bill, S. 1612, 104th Cong. §1 (1996), simply substituted "possesses" for "uses or carries." The House Bill, H.R. 125, 104th Cong. § 5 (1996) made the same replacement while also setting up a different scheme respecting the nexus between the firearm and the predicate offense: "a person who, during and in relation to [a predicate offense] . . . possesses a firearm . . . ." Neither bill was enacted.

Congress again proposed amendments to § 924(c) the following year. The 1997 Senate bill only added "possesses" to the list of prohibited acts ("any person who, during and in re-

lation to [a predicate offense] . . . *uses, carries or possesses* a firearm"). S. 191, 105th Cong. § 1 (1997). The House Bill, on the other hand, simply repeated the language of the failed 1996 bill. H.R. 424, 105th Cong. § 1 (1997). Neither the 1996 nor 1997 bills directly addressed or specifically sought to redefine the term "use."

Congress ultimately enacted the amended § 924(c) in 1998. This amendment added the "possession" offense (proscribing "possession of a firearm . . . in furtherance of" a predicate offense), which provides for a lower burden of proof with respect to a defendant's control of the firearm ("possession" instead of "use") while raising the burden with respect to the firearm's nexus with the predicate offense ("in furtherance of" instead of "during and in relation to"). See *Combs*, 369 F.3d at 932-33; *Mackey*, 265 F.3d at 460-61.

Thus, the amendment of § 924(c)(1)(A) after *Bailey* did not alter the "use" offense at all, and *Bailey*'s interpretation of the term "use" was not affected. The legislative history of § 924(c)(1)(A) indicates no intent to expand the meaning of "use" beyond *Bailey*'s active-employment sense, nor does it reflect any intent to import the concept of receipt into the term "use." In fact, Congress thrice *rejected* attempts to broaden the scope of § 924(c) by replacing "use" with "possess," while maintaining the lower "during and in relation to" standard. Cf. *Dixon* v. *United States*, 126 S. Ct. 2437, 2447 (2006) (Congress' failure to use the language and structure of the Model Penal Code in the Safe Streets Act provides evidence that Congress intended a different burden-of-proof standard than provided in the Code). As such, there is no clear evidence that Congress intended to include receipt of firearms within the scope of the term "use," and hence the legislative history of § 924(c)(1)(A) provides no grounds for disregarding the rule of lenity in this case.

In fact, construing the term "use" to include receipt of firearms could undermine the very policies motivating Congress' enactment of § 924(c)(1)(A). The "basic purpose" of

§ 924(c) is "to combat the 'dangerous combination' of 'drugs and guns.'" *Muscarello*, 524 U.S. at 132 (quoting *Smith*, 508 U.S. at 240). Yet because a conviction under § 924(c) guarantees a mandatory minimum sentence, § 924(c) provides government agents in sting operations considerable incentives to introduce firearms into drug transactions. Government agents in sting operations have admitted that they have intentionally structured transactions so as to involve both firearms and drugs in order to increase a defendant's sentence under § 924(c). See *Westmoreland*, 122 F.3d at 436 (explaining that the government agent "testified that he purposefully introduced the gun into the transaction for the purposes of setting up a conviction on the particular offense defined in section 924(c)(1)"); see also *United States* v. *Cannon*, 88 F.3d 1495, 1507 n.3 (8th Cir. 1996) (noting the court "recently reiterated [its] discomfort with reverse-sting operations, which have great potential for abuse" and urging courts to conduct "the most careful scrutiny and probing examination"). Such an application of § 924(c)(1)(A) cannot be squared with the statute's fundamental purpose of "'persuad[ing] the man who is tempted to commit a Federal felony to leave his gun at home.'" *Muscarello*, 524 U.S. at 132 (quoting Rep. Poff, § 924(c)'s chief legislative sponsor).

These concerns are not merely academic. Reported cases from across the country demonstrate that government agents routinely introduce firearms or drugs into a transaction that otherwise would not have involved this "dangerous combination." See, *e.g.*, *United States* v. *Cotto*, 456 F.3d 25, 26-27 (1st Cir. 2006) (confidential informant told the defendant that she would only accept drugs as payment for firearms), *petition for cert. filed*, No. 06-8168 (U.S. Dec. 5, 2006); *Warwick*, 167 F.3d at 975-76 (affirming dismissal of § 924(c)(1)(A) charge where an undercover officer insisted at the last minute that the defendant accept a firearm as partial payment for drugs); *Westmoreland*, 122 F.3d at 436; *United States* v. *Zuniga*, 18 F.3d 1254, 1256 (5th Cir. 1994) (under-

cover agent contacted defendant and proposed sale of firearms in exchange for heroin); *United States* v. *Fabian*, No. 2:04-CR-71-01, 2005 WL 2043008, at *1, 5-6 (D. Vt. Aug. 23, 2005) (describing claim that government agents insisted that the defendant accept firearms as payment for drugs); *United States* v. *Carreiro*, 14 F. Supp. 2d 196, 200 (D.R.I. 1998) (acquitting the defendant of a § 924(c)(1)(A) offense where undercover agents demanded that the defendant pay for a firearm with drugs, since "Carreiro had no intention of including drugs in the transaction until government agents insisted that it was part of the deal"); *United States* v. *Cannon*, 886 F. Supp. 705, 706 (D.N.D. 1995) (noting that defendants purchased a machinegun in exchange for crack cocaine after "some salesmanship by the officer and agent"), *rev'd*, 88 F.3d 1495 (8th Cir. 1996). See also *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1507 (9th Cir. 1997) (noting that agents in drugs-and-guns transaction may have provided machine guns in lieu of other firearms without defendant's knowledge in order to increase § 924(c) sentence). In this very case, it was the government's confidential informant, not the Petitioner, who insisted that the firearm be purchased with narcotics rather than cash. *United States* v. *Watson*, No. 05-31094, 191 Fed. App'x 326, 327 (5th Cir. 2006) (per curiam).

Congress' plain intent in carefully balancing "use" and "possession" in § 924(c) and requiring additional proof that a firearm facilitated the drug transaction, and the additional policy reasons for rejecting Respondent's expansion of the scope of 924(c)(1) demonstrate that that there is no clear and unambiguous indication by Congress that "use" should include receiving a firearm. As a result, there is simply no basis for disregarding the rule of lenity in this case. See *Granderson*, 511 U.S. at 54 ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). Section 924(c)(1)'s "use" provision cannot be construed to en-

compass receiving a firearm, and thus Petitioner's conviction under § 924(c)(1) should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

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